

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

SHANNON PULS, *et al.*,

Plaintiffs

v.

RANDY SHEPARDSON, *et al.*,

Defendants

Civil No. 98-49-P-C

GENE CARTER, District Judge

**MEMORANDUM OF DECISION AND ORDER**

Plaintiffs Shannon Puls and Drew Puls d/b/a WebTools, and WebTools, L.L.C. have brought this suit against Defendants Randy Shepardson and Axxess, Inc. Now before the Court is Axxess Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(2) and Motion to Dismiss for Improper Venue Pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406 (Docket No. 4). For the reasons set forth below, the Court will deny Axxess's motions.

**I. BACKGROUND**

The alleged facts are as follows. In 1997, Plaintiffs Shannon Puls, a resident of Edwardsville, Illinois, and his brother Drew Puls, a resident of St. Louis, Missouri, decided to endeavor to acquire and develop web sites oriented toward investment management. Affidavit of Shannon Puls ("Puls Aff.") (Docket No. 6) ¶¶ 1-2. To this end, they formed a limited liability company called WebTools, also a plaintiff in this action. *Id.* ¶ 3.

Defendant Randy Shepardson, a resident of Turner, Maine in 1997 and now a resident of Connecticut, was the owner of an investment management services provider located in Lewiston, Maine, called StockTools, which sold its services through its web site on the Internet. *Id.* ¶ 4. Defendant Axxess is a Nevada corporation with a principal place of business in Altamonte Springs, Florida. Affidavit of Kevin Lichtman ("Lichtman Aff.") (Docket No. 4, Ex. A) ¶¶ 2-3.

In December 1997, Shannon Puls communicated by electronic mail with Shepardson in order to open discussions directed toward the acquisition of StockTools by WebTools. Puls Aff. ¶ 3. The negotiations continued by electronic mail, facsimile, and telephone. *Id.* ¶ 4. In January 1998, Shannon Puls traveled to Maine to conduct a personal investigation of the assets and capabilities of StockTools. *Id.* During this meeting, Shepardson informed Shannon Puls that a representative of Axxess had met with him in Lewiston, Maine on the previous day. *Id.* Shepardson showed Shannon Puls the proposed contract between StockTools and Axxess, and Shannon Puls understood Axxess to be a competitor for the purchase of StockTools. *Id.* At that meeting, Shannon Puls and Shepardson reached an oral agreement for the acquisition of StockTools by WebTools. *Id.* ¶ 5. Shannon Puls directed his counsel to prepare a written agreement expressing the terms and conditions of the oral agreement. *Id.* ¶ 6. Shannon Puls understood Shepardson's acceptance of the deposit which he gave to Shepardson at the meeting in Maine to signify Shepardson's acceptance of the offer to purchase StockTools. *Id.* ¶ 7.

On January 14, 1998, Shepardson informed Shannon Puls that he would not go forward with the transaction because he had entered into a binding agreement with Axxess. *Id.* ¶ 9. Shepardson told him that Axxess had paid a purchase amount exceeding by \$100,000 the amount agreed to by Shepardson and Shannon Puls. *Id.* Shannon Puls understood from his conversation

with Shepardson that he had been told by both Axxess's CEO and attorney that he could disregard the purchase and sale agreement with WebTools because the final contract had not been executed. *Id.* Axxess represented that the deposit paid toward the purchase price by WebTools was irrelevant and without substance. *Id.* The communications between Axxess and Shepardson took place by telephone or e-mail. *Id.* ¶ 10; Lichtman Aff. ¶¶ 6, 8. After Axxess acquired StockTools, the business assets of StockTools were relocated from Maine to Florida. Puls Aff. ¶ 11. Plaintiffs then brought this suit, claiming breach of contract by Shepardson and wrongful interference by Axxess.

## II. PERSONAL JURISDICTION

In defending a motion to dismiss pursuant to Rule 12(b)(2), Plaintiffs bear the burden of proving that jurisdiction exists. *See Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). When the Court decides the motion on the basis of written submissions, including pleadings, affidavits, and exhibits, Plaintiffs must make a prima facie showing of personal jurisdiction by "proffer[ing] evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction."<sup>1</sup> *Id.* The record must contain specific allegations of jurisdictional facts, which the Court will construe in Plaintiffs' favor. *See Archibald v. Archibald*, 826 F. Supp. 26, 28 (D. Me. 1993). Judicial analysis of personal jurisdiction is a "fact-sensitive inquiry." *Sawtelle v. Farrell*, 70 F.3d 1381, 1388 (1st Cir. 1995).

The Court's exercise of personal jurisdiction over a nonresident defendant is controlled by a two-part investigation. First, the Court must assess whether the forum state's long-arm statute

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<sup>1</sup> When the Court applies the prima facie standard and denies a motion to dismiss, "it is implicitly, if not explicitly, ordering 'that hearing and determination [of the motion to dismiss] be deferred until the trial.'" *Boit*, 967 F.2d at 676 (quoting Fed. R. Civ. P. 12(d)).

authorizes the exercise of jurisdiction.<sup>2</sup> Second, the Court must determine whether the exercise of jurisdiction under the state statute complies with the constraints of due process required by the United States Constitution. *See Archibald*, 826 F. Supp. at 28 (citing *Hahn v. Vermont Law School*, 698 F.2d 48, 49-50 (1st Cir. 1983)).

The Court concludes that jurisdiction is proper under Maine's long-arm statute, which provides for jurisdiction over causes of action arising from "[d]oing or causing a tortious act to be done, or causing the consequences of a tortious act to occur within this State." 14 M.R.S.A. § 704-A(2)(B); *see also Coolidge v. Judith Gap Lumber Co.*, 808 F. Supp. 889, 891 (D. Me. 1992) ("Maine's long-arm statute has been interpreted to allow courts sitting in Maine to exercise jurisdiction over any party who . . . commits a tort, if either the tort itself or the consequences of the tort occurs in the state."). In the instant case, Plaintiffs allege that Axxess wrongfully interfered with their contract with Shepardson, a then-Maine resident, by contacting him in Maine at StockTools' principal place of business and conveying allegedly false information to him in an attempt to persuade him to renege on Plaintiffs' contract. The Court is satisfied that Plaintiffs' allegations properly support the exercise of its jurisdiction pursuant to the section of Maine's long-arm statute authorizing jurisdiction over causes of action arising from torts committed in the state of Maine.

Likewise, the Court determines that its exercise of personal jurisdiction over Axxess does not offend the principles of due process. Due process generally mandates that the forum's exercise of personal jurisdiction over a nonresident defendant be predicated upon "certain

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<sup>2</sup> The Court notes that "Maine's jurisdictional reach is coextensive with the due process clause of the United States Constitution." *Murphy v. Keenan*, 667 A.2d 591, 593 (Me. 1995) (citations omitted).

minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The applicable minimum-contacts standard depends on whether the forum is exercising general or specific jurisdiction. *See Archibald*, 826 F. Supp. at 29. As Plaintiffs' allegations of Axxess's in-forum activities do not even begin to approach the level of "substantial" or "continuous and systematic" activities necessary to support the exercise of general jurisdiction, *see id.* at 29, the Court will focus its analysis upon specific personal jurisdiction.

"Specific personal jurisdiction may be asserted where the cause of action arises directly out of, or relates to, the defendant's forum-based contacts." *United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1088-89 (1st Cir. 1992) (citing *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 & n.8 (1984)). The existence of specific jurisdiction "turns on an evaluation of 'the relationship between the defendant, the forum, and the litigation.'" *Archibald*, 826 F. Supp. at 30 (quoting *Helicopteros*, 466 F. Supp. at 414). The Court examines this relationship to determine if it "forms a fair and reasonable foundation for the exercise of jurisdiction over the defendant." *Howell Lab., Inc. v. Clear Channel Communications, Inc.*, 751 F. Supp. 258, 261 (D. Me. 1990). The First Circuit has developed the following tripartite test to evaluate the exercise of specific jurisdiction:

First, the claim underlying the litigation must directly *arise out of, or relate to*, the defendant's forum-state activities. Second, the defendant's in-state activities must represent a *purposeful availment* of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's

laws and making the defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be *reasonable*.

*Pleasant Street*, 960 F.2d at 1089 (emphasis added). These three factors -- relatedness, purposefulness, and reasonableness -- must be satisfied for a court to exercise specific jurisdiction over a nonresident defendant.

Plaintiffs' claim -- wrongful interference -- clearly arises out of Axxess's contacts with Maine, namely its alleged interactions with Shepardson aimed at interfering with Plaintiffs' contract with him. The Court acknowledges that Axxess conducted its interactions with Shepardson in part via electronic mail, but concludes that these contacts are analogous to contacts made by telephone, which are considered contacts for the purpose of the jurisdictional analysis. *See Sawtelle*, 70 F.3d at 1389-90 ("The transmission of information into [the forum state] by way of telephone or mail is unquestionably a contact for purpose of [the jurisdictional] analysis."). Therefore, Plaintiffs' claim arises directly out of Axxess's forum-state activities.

The purposeful-availment prong of the test is less helpful in the tort context because a tortfeasor is not contemplating the benefits and protections of Maine law. *See Northeastern Land Services, Ltd. v. Schulke*, 988 F. Supp. 54, 59 (D.R.I. 1997). However, the Court is satisfied that Axxess's alleged actions made the possibility of its appearance before Maine courts sufficiently foreseeable. Plaintiffs are alleging intentional tortious action by multiple agents of Axxess directed toward and accomplished in Maine and, as such, it is reasonably foreseeable that such action could result in a lawsuit in the state of Maine.<sup>3</sup>

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<sup>3</sup> Axxess directs the Court's attention to *Architectural Woodcraft Co. v. Read*, 464 A.2d 210, 213 (Me. 1983), in which the Maine Law Court held that "the existence of a single contract  
(continued...)

The five gestalt factors are designed to test the reasonableness of the Court's exercise of jurisdiction over a nonresident defendant.<sup>4</sup> These factors aid the Court in determining whether the exercise of personal jurisdiction "comports with notions of 'fair play and substantial justice.'" *Nowak v. Tak How Inv., Ltd.*, 94 F.3d 708, 717 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1333 (1997) (quoting *International Shoe*, 326 U.S. at 320). The burden at this stage of the inquiry falls upon the defendant. *See Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 210 (1st Cir. 1994).

Although Defendant has not specifically addressed the gestalt factors, the Court will review the factors relevant to the instant case. Because litigation in an out-of-state forum is usually a costly and inconvenient undertaking, "[the burden-of-appearance] factor is only meaningful where a party can demonstrate some kind of special or unusual burden." *Pritzker v. Yari*, 42 F.3d 53, 64 (1st Cir. 1994). Axxess has not offered any compelling special or unusual circumstances that amplify its burden of appearance in Maine. Thus, while the Court

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<sup>3</sup>(...continued)

with a resident plaintiff coupled with the use of interstate communications does not establish a basis for asserting jurisdiction over a nonresident defendant." The court found personal jurisdiction to be lacking over a purchaser who had subsequently stopped payment on a contract for a custom staircase. *Id.* at 211. The purchaser had not come to Maine nor had any contact with this forum beyond the contract for the staircase and the communications which produced it and, thus, could not be considered to have purposefully availed himself of the benefits of conducting activities in Maine. *Id.* at 213. The Court, however, finds the instant case to be distinguishable in that Plaintiffs are alleging that Axxess wrongfully interfered with their contract with a Maine resident by intentionally sending communications into the state. When the acts that comprise the heart of the claim are in-state activities, the Court will consider the actor to have purposefully availed itself of the benefits of conducting activities in Maine.

<sup>4</sup> The factors are: (1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies. *Pleasant Street*, 960 F.2d at 1088 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

acknowledges that a suit in Maine does involve cost and inconvenience for Axxess, this factor does not weigh heavily against the exercise of jurisdiction in the Court's determination of reasonableness.

In analyzing personal jurisdiction, the Court does not engage in "judicial second-guessing" but defers to Plaintiff's choice of forum as the best indicator of his own convenience.<sup>5</sup> *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 151 (1st Cir. 1995). If Plaintiffs have to proceed against Shepardson in Maine and against Axxess in a different forum, judicial resources will be wasted. The judicial system's interest is best served by avoiding duplicative and piecemeal litigation. *See Pritzker*, 42 F.3d at 64.

The three factors discussed above persuade the Court that the exercise of jurisdiction in this case is not unreasonable, and consideration of the remaining two factors, the interest of the forum state and the common interest of sovereigns, does not affect this conclusion.

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<sup>5</sup> Axxess does not allege, nor is there any indication in the record, that Plaintiffs chose this forum solely to harass Axxess.



### III. VENUE

The Court initially notes that venue is proper in this district under 28 U.S.C. § 1391(a)(2), which provides that a civil action in which jurisdiction is based only upon diversity of citizenship may be brought in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Axxess argues that the Court should elect to transfer the case to Florida pursuant to 28 U.S.C. § 1404(a), which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The Court has discretion in determining whether to transfer a case from one proper venue to another pursuant to section 1404(a).

*Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 925 F. Supp. 36, 38 (D. Me. 1996). In exercising its discretion, the Court considers factors such as "the convenience of the parties and witnesses, the order in which jurisdiction was obtained by the district court, the availability of documents, and the possibilities of consolidation." *Cianbro Corp. v. Curran-Lavoie, Inc.*, 814 F.2d 7, 11 (1st Cir. 1987).

The burden falls upon Axxess to present evidence demonstrating why the case should be transferred. *Ashmore*, 925 F. Supp. at 38. The Court will not disturb Plaintiffs' choice of forum unless Axxess's evidence predominates in favor of transfer. *Id.* Axxess argues that its employee-witnesses are located in Florida. However, "[a] defendant's motion to transfer under section 1404(a) may be denied when the witnesses are employees of the defendant and their presence can be obtained by the party." *Id.* (citation omitted). Axxess also argues that it will be no less inconvenient for Plaintiffs to travel to Florida than to Maine. However, a plaintiff's choice of forum should be given "substantial deference." *Berrigan v. Greyhound Lines, Inc.*, 560 F. Supp.

165, 169 (D. Mass. 1982). This guiding principle does not change simply because Plaintiffs have chosen to bring their suit in a forum that is not their residence. *Ashmore*, 925 F. Supp. at 39. The Court concludes that Axxess has not presented evidence sufficient to convince the Court that the interests of both justice and the parties would be best served by transferring this case to Florida.<sup>6</sup>

#### IV. CONCLUSION

Accordingly, it is **ORDERED** that Defendant Axxess's Motions to Dismiss be, and they are hereby, **DENIED**.

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GENE CARTER  
District Judge

Dated at Portland, Maine this 8<sup>th</sup> day of June, 1998.

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<sup>6</sup> The Court further notes that its fast docket will bring about a timely resolution of this matter. "A prompt trial is not without relevance to the convenience of parties and witnesses and the interest of justice." Federal Practice and Procedure § 3854, at 456 (quoting *Fannin v. Jones*, 229 F. 2d 368, 369-70 (6th Cir.), *cert. denied*, 351 U.S. 938 (1956)).